Supreme Court, U.S.
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No. 93-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

MICHAEL J. KURZAWA,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the "same elements" test for double jeopardy announced in United States v. Dixon, 113 S.Ct. 2849 (1993), applies retroactively to allow the successive prosecution of a defendant previously acquitted of the "same offense" as defined under the then-controlling analysis in Grady v. Corbin, 495 U.S. 508 (1990).

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, there were no parties in the proceedings in the Wisconsin Supreme Court whose judgment is sought to be reviewed.

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PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Wisconsin Supreme Court reinstating the charges in this case is reported at State v. Kurzawa, 180

Wis. 2d 502, 509 N.W.2d 712 (1994). That decision is reprinted at Appendix A (App. 1a-32a) to this Petition.

The decision of the Wisconsin Court of Appeals, which had ordered the charges dismissed, is reported at State v. Kurzawa, 173 Wis. 2d 769, 496 N.W.2d 695 (Ct. App. 1993). That decision is reprinted at Appendix B (App. 1b-14b) to this Petition.

The decision and order of the Wisconsin Circuit Court denying the motion to dismiss on double jeopardy grounds are unreported. They are reprinted at Appendix C (1c-11c) of this Petition.

JURISDICTION

The decision of the Wisconsin Supreme Court was entered on January 12, 1994. That Court denied the timely motion for

reconsideration on February 22, 1994. (Order reprinted at Appendix D (App. 1d)). This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition concerns the construction and application of the Due Process and Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution which provide:

> No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law... .

U.S. Const. amend. V.

This petition also concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which

provides:

> No state shall ... deprive any person of life, liberty, or property, without due process of law... .

U.S. Const. amend. XIV.

This petition also concerns the construction and application of the Ex Post Facto Clauses of the United States Constitution which provide:

> No bill of attainder or ex post facto law shall be passed.

U.S. Const. Art. I, §9.

> No state shall ... pass any ... ex post facto law... .

U.S. Const. Art. I, §10.

STATEMENT OF THE CASE

By criminal complaint filed on or about April 29, 1989, the State of Wisconsin charged Michael Kurzawa in Milwaukee County Circuit Court with two counts of embezzling more than $2,500 in violation

of Wis. Stat. §§943.20(1)(b) & (3)(c). The basis for the charges was that, between May, 1983 and March, 1986, Kurzawa illegitimately obtained over $96,000 from the Greater Milwaukee Bank checking accounts of Drs. Robert and Clarice Beckes by writing and cashing unauthorized checks to himself on those accounts.

On September 24, 1990, the Milwaukee County case against Kurzawa proceeded to jury trial on an amended information charging him with two counts of felony theft by fraud in violation of Wis. Stat. §§943.20(1)(d) & (3)(c). To prove the allegations of theft, the state relied upon Kurzawa's alleged withdrawal of the complainants' funds by writing a number of checks to himself on their accounts, forging their names as the drawers of the checks, and cashing the checks. In his

opening statement, the prosecutor summarized his theory and Kurzawa's conduct upon which he would rely:

> [O]ver the past several years Michael Kurzawa was writing checks on both of their accounts and withdrawing funds from their accounts without their knowledge and their permission.

On September 28, 1990, the trial court, Honorable William D. Gardner, presiding, granted Kurzawa's motion for a judgment of acquittal and judgment was entered accordingly.

On or about April 10, 1991, the State of Wisconsin filed a criminal complaint in Walworth County Circuit Court in the present case, charging Kurzawa with 54 counts of uttering a forged writing in violation of Wis. Stat. §943.38(2). Each count refers to Kurzawa's alleged uttering as genuine of a forged check drawn on the Greater Milwaukee Bank checking account of

either Clarice or Robert Beckes. Kurzawa's alleged forgery and uttering of each of the 54 checks which form the bases for the charges in the present case was included within the conduct alleged to have constituted theft by fraud in the prior Milwaukee County case.

On October 18, 1991, Mr. Kurzawa filed with the Circuit Court a Motion to Dismiss: Double Jeopardy. No evidentiary hearing was held as the parties stipulated to the relevant facts.

On April 1, 1992, the trial court entered its decision denying Mr. Kurzawa's motion to dismiss (App. 1c-9c). The Court entered its written Order denying that motion on April 8, 1992 (App. 10c-11c).

On interlocutory appeal, the Wisconsin Court of Appeals reversed the order of the trial court. That Court remanded with directions to dismiss the criminal com-

plaint on the grounds that the Walworth County prosecution, following the acquittal in Milwaukee County for the same conduct, denied Kurzawa his right to be free from double jeopardy under Grady v. Corbin, 495 U.S. 508 (1990) (App. 1b - 14b). State v. Kurzawa, 173 Wis. 2d 769, 496 N.W.2d 695 (Ct. App. 1993).

The Wisconsin Supreme Court granted the state's petition for review of the Court of Appeals' decision on April 6, 1993.

After full briefing by the parties below, this Court on June 28, 1993, entered its decision in United States v. Dixon, 113 S.Ct. 2849 (1993). Dixon overruled Grady's "same conduct" double jeopardy analysis. The Court concluded instead that the "same elements" analysis applied in single prosecution situations, see Blockburger v. United States, 284 U.S. 299 (1932), also applies to successive

prosecutions.

The Wisconsin Supreme Court then ordered supplemental briefs addressing the impact of Dixon. Kurzawa timely filed his supplemental brief, specifically arguing that Dixon did not apply retroactively to this case and could not do so consistently with the Due Process Clause.

By decision dated January 12, 1994, the Wisconsin Supreme Court reversed the decision of the Court of Appeals and reinstated the charges against Mr. Kurzawa (App. 1a-32a). State v. Kurzawa, 180 Wis. 2d 502, 509 N.W.2d 712 (1994). That Court rejected Kurzawa's argument that retroactive application of Dixon is inappropriate and would violate due process in this case (App. 9a-21a).

That Court denied Kurzawa's timely motion for reconsideration by Order dated February 22, 1993 (App. 1d).

REASONS FOR ALLOWANCE OF THE WRIT

Special and important reasons justify review by this Court of the question whether the new double jeopardy analysis in United States v. Dixon, 113 S. Ct. 2849 (1993), is to be applied retroactively. Such application is neither required by prior decisions of this Court nor consistent with the requirements of due process. Nonetheless, a number of lower courts, including the Wisconsin Supreme Court in this case, have applied Dixon retroactively. Many courts have done so without even discussing the propriety of such application and without regard for contrary decisions in anologous cases.

As directly applied to Kurzawa, the answer to this question spells the difference between freedom and facing prosecution on 54 felony counts of utter-

ing a forged instrument. This prosecution is not barred under the Blockburger/Dixon, "same elements" analysis. However, the "same conduct" analysis under Grady v. Corbin, 495 U.S. 508 (1990), was the controlling law both when Kurzawa was acquitted and when he is alleged to have committed these offenses. Under that analysis, the present prosecution is barred, as the Wisconsin Court of Appeals correctly held. (App. 4b-9b).[1]

The issue of retroactivity obviously covers a broad range of possible circumstances. Kurzawa's argument here, however, addresses only the situation in which a defendant's rights under Grady were vested or perfected prior to the Dixon decision on June 28, 1993. Kurzawa

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[1] Having found Dixon to apply here, the Wisconsin Supreme Court did not address application of Grady's "same conduct" analysis to these facts.

need not and does not claim that Dixon should apply only prospectively to offenses committed after that decision.[2]

Grady was decided May 29, 1990, so that Kurzawa's right to be free from subsequent prosecutions under the terms of that decision vested at the moment of his acquittal on the Milwaukee County charges on September 28, 1990. Jeopardy attached when the jury was sworn, Crist v. Bretz, 437 U.S. 28, 38 (1978), and vested with the directed verdict of acquittal, see Lee v. United States, 432 U.S. 23, 29-30 (1977). See also Richardson v. United States, 468 U.S. 317, 325 (1984) (Double Jeopardy Clause "applies only if there has

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[2] Although this Court once provided constitutional protection to a defendant's interest in even an unperfected defense, see Kring v. Missouri, 107 U.S. 221 (1883), it overruled that decision in Collins v. Youngblood, 497 U.S. 37, 50 (1990).

been some event ... which terminates the original jeopardy"). The present prosecution was not brought until April 10, 1991, at a time when Kurzawa's right to be free from such reprosecution was established by the controlling decision of this Court in Grady.[3]

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[3] Grady, although not decided until 1990, was fully retroactive and thus applied to Kurzawa's alleged misdeeds. McIntyre v. Trickey, 975 F.2d 437 (8th Cir. 1992), vacated and remanded sub nom. (for reconsideration in light of Dixon), Caspari v. McIntyre, 114 S.Ct. 375 (1993); Johnson v. Howard, 963 F.2d 342 (11th Cir. 1992); Darnell v. Commonwealth, 408 S.E.2d 540 (Va. App. 1991). Full retroactivity is inherent in "a ruling that the trial court lacked authority to convict or punish a criminal defendant in the first place." United States v. Johnson, 457 U.S. 537, 550 (1982); see, e.g., Robinson v. Neil, 407 U.S. 505 (1973) (double jeopardy rule in Waller v. Florida, 397 U.S. 387 (1970), is fully retroactive); United States v. U.S. Coin and Currency, 401 U.S. 715 (1970) (Fifth Amendment defense from Marchetti v. United States, 390 U.S. 39 (1968), fully retroactive).

The Wisconsin Supreme Court's suggestion that Grady did not control Kurzawa's case (App. 13a) thus was erroneous.

I.

IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION

This is the paradigmatic case for resolution of an important federal question, as yet unaddressed by this Court. See Sup. Ct. R. 10.1(c). Resolution of Dixon's retroactivity will have widespread ramifications. While only two state appellate courts have addressed this question directly, see Kurzawa, supra.; People v. Miller, 255 Ill. App. 3d 577, 626 N.E.2d 759 (1994) (petition for appeal pending), a number of other courts have simply applied Dixon retroactively without even discussing the propriety of such application. E.g., United States v. Nyhuis, 8 F.3d 731, 734-35 (11th Cir. 1993), reh'g denied, 15 F.3d 1099 (11th Cir. 1994). Indeed, several such cases have reversed prior orders which had

dismissed charges under Grady, again without even discussing the propriety of applying Dixon retroactively. E.g., United States v. Colon-Osorio, 10 F.3d 41 (5th Cir. 1993) (petition for cert. filed); Sanchez v. United States, 3 F.3d 366 (11th Cir. 1993), cert. denied, 114 S. Ct. 1051 (1994); United States v. Liller, 999 F.2d 61 (2d Cir. 1993); People v. Mauricio, 249 Ill. App.3d 904, 619 N.E.2d 1348 (1993); State v. Holquin, 861 S.W.2d 919 (Tex. Crim. App. 1993).

Retroactive application of Dixon, however, undermines the very purpose of the Double Jeopardy Clause. How can anyone feel comfortable in the protection of that Clause, free of a "continuing state of anxiety and insecurity," see Green v. United States, 355 U.S. 184, 187-88 (1957), when that protection may be nullified retroactively at virtually any

minute with a change of composition of the Court? Moreover, such application is neither required nor consistent with due process.

This Court has long since rejected Blackstone's notion that courts merely find the law so that all new decisions are fully retroactive. See, e.g., United States v. Johnson, 457 U.S. 537, 542 & n.7 (1982); cf. Teague v. Lane, 489 U.S. 288 (1989) (new constitutional rules apply to all criminal cases not yet final; with limited exceptions, they do not apply in collateral review of cases already "final").

Concededly, in Griffith v. Kentucky, 479 U.S. 314 (1987), this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final,

with no exception for cases in which the new rule constitutes a 'clear break' with the past." Id., at 328. Indeed, certain members of this Court have gone so far as to argue that such retroactivity is required by the Court's constitutional obligation to decide only "cases" and "controversies." U.S. Const. Art. III, §2, cl. 1; see James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 2449-50 (1991) (Blackmun, J., concurring in the judgment).

Both this Court and the lower courts, however, have recognized that Griffith must be read in context. See, e.g., American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 198 (1990); United States v. Morehead, 959 F.2d 1489, 1512 (10th Cir. 1992). Griffith addressed procedural rather than substantive rights.

Also, the new rule held to be retroac-

tive in Griffith, unlike Dixon's new double jeopardy rule, expanded the rights of criminal defendants by lowering the defendant's burden in establishing a primae facie case of racial discrimination in jury selection. See Batson v. Kentucky, 476 U.S. 79 (1986). Moreover, the rational of Griffith focused extensively upon the "actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. 479 U.S. at 323.

> Griffith's adoption of a per se rule of retroactivity can thus be understood as a rejection of [the prior approach of sometimes granting the government's reliance interests more weight than the defendant's interests in receiving the benefits of the new constitutional rule,] in favor of providing expanded procedural protection to criminal defendants.

American Trucking, 496 U.S. at 198.

Also, although this Court on occasion has stated that "the federal constitution has no voice upon the subject" of retroactivity, Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932); see Johnson, 457 U.S. at 542, that simply is not the case. A number of this Court's decisions support the proposition that applying a new interpretation of constitutional law to divest an individual of the legal effect of a prior final judgment in a criminal case cannot be reconciled with the requirements of the Due Process Clause. U.S. Const. amends. V & XIV.

In Marks v. United States, 430 U.S. 188 (1977), this Court faced the issue whether it could retroactively apply the reformulated obscenity standards it announced in Miller v. California, 413 U.S. 15 (1973), to the potential detriment of a defendant

in a criminal case, rather than the more favorable formulation of Memoirs v. Massachusetts, 383 U.S. 413 (1966) (plurality opinion). The Court held that, although the Ex Post Facto Clause directly applies only to legislative acts, its underlying principles are "fundamental to our concept of constitutional liberty." 430 U.S. at 191 (citation omitted). Accordingly, due process bars retroactive application of a judicial enlargement of criminal liability where such application has the same effect as a prohibited ex post facto law:

> "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

Id. at 192, quoting Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964).

This Court explained in Collins v. Youngblood, 497 U.S. 37 (1990), that,

> [a]lthough increased punishments are not mentioned explicitly in the historical sources, the Court has never questioned their prohibition, apparently on the theory that "[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty."

Id., at 44 (citing Calder v. Bull, 3 Dall. 386, 397 (1798) (opinion of Paterson, J.)).

Kurzawa's constitutional right to repose and the finality of his prior acquittal vested long before the present charges were filed, and long before Dixon. The binding constitutional rule defining the legal effect of that acquittal in September, 1990, was that set forth in Grady. That rule provided that, after Kurzawa was once tried and acquitted, he could not again be placed in jeopardy of

punishment for the same offense as defined in that case. Retroactive application of Dixon's new analysis to "unvest" that right thus would operate exactly like an ex post facto law, increasing Kurzawa's risk of punishment and, as such, would deny him due process.

Even in the civil realm, in which the Ex Post Facto Clause does not apply, the government cannot revive liability once extinguished without running afoul of the due process clause. William Danzer & Co. v. Gulf & S.I.R. Co., 268 U.S. 633 (1925). The William Danzer Court distinguished between civil statutes of limitation, which merely bar a judicial remedy without affecting the underlying obligation, and statutes of repose, which not only bar the remedy but also destroy the liability of a defendant to a plaintiff. Id., at 636-37. Retroactive extension of

the former does not deny due process, see Campbell v. Holt, 115 U.S. 620 (1885), while reviving the liability itself would. 268 U.S. at 636-37. See also Beam, 111 S. Ct. at 2446 (Souter, J.) ("[O]nce suit is barred by res judicata or by statutes of limitations or repose, a new rule cannot open the door already closed").

The issue in a criminal case, of course, is not primarily one of remedy, but of punishment. See United States ex rel. Marcus v. Hess, 317 U.S. 537, 548-49 (1943) (distinguishing "between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice"). Once Kurzawa was acquitted in Milwaukee County, the then-controlling decision in Grady acted to extinguish any and all criminal liability for the "same conduct"

upon which that prosecution was based. Due process bars this Court from reviving that liability.

Due process similarly limits the government power retroactively to deprive even a civil litigant of legal rights once they have vested in a final judgment. McCullough v. Virginia, 172 U.S. 102, 123-125 (1898). That principle surely must apply as well when a criminal defendant's rights are vested in a final judgment of acquittal. The equities are even stronger in such a case, where an individual is once subjected to jeopardy of criminal punishment with the implied governmental promise that he or she would not again be subjected to jeopardy for the same conduct. Cf. Santobello v. New York, 404 U.S. 257, 262 (1971) ("criminal justice ... must be attended by safeguards to insure the defendant what is reasonably

due in the circumstances," so that governmental promise which induces guilty plea "must be fulfilled").

See also Kaiser Aluminum v. Bonjorno, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring):

> Justice Story said that "retrospective laws are ... generally unjust; and ... neither accord with sound legislation nor with the fundamental principles of the social compact.: J. Story, Commentaries on the Constitution § 1398 (1851). The United States Constitution itself so far reflects these sentiments that it proscribes all retroactive application of punitive law, U.S. Const. Art. I, §9, cl. 3, see Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648 (1798), and prohibits (or requires compensation for) all retroactive laws that destroy vested rights. [citations omitted].

II.

CONFLICTS AMONG LOWER COURTS

Mr. Kurzawa can cite to no direct conflict among the decisions of the lower courts on the specific issue raised here. See Sup. Ct. R. 10.1(b). As noted, only one other case actually analyzed the question, and it applied Dixon retroactively. See People v. Miller, 255 Ill. App.3d 577, 626 N.E.2d 759 (1994). Other courts simply assume Dixon is retroactive without discussing the matter. E.g., Sanchez, supra.

The decision below does, however, conflict with lower court decisions in analogous situations. Both the Fifth Circuit and Texas Court of Criminal Appeals, for instance, have determined that Texas' retroactive abandonment of the "carving doctrine," essentially a "same

transaction" test for double jeopardy, violated due process. Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. 1988); Clay v. Lynaugh, 846 F.2d 8 (5th Cir. 1988); Ex Parte Scales, 853 S.W.2d 586 (Tex. Crim. App. 1993).

The lower courts similarly have long recognized that ex post facto principles bar any attempt to revive or reinstate a criminal charge or cause of action for which the statute of limitations previously has run. E.g., Falter v. United States, 23 F.2d 420, 425-26 (2d Cir.) (L. Hand, J.), cert. denied, 277 U.S. 590 (1928); United States v. Roselli, 1994 WL 4195, *2 (N.D.N.Y. 1994); United States v. Fraidin, 63 F. Supp. 271, 276 (D. Md. 1945); Moore v. State, 43 N.J. Law. 203 (1881); State v. Sneed, 25 Tex. Supp. 66 (1860). "[A]n act condoned by the expiration of the statute of limitations is no

longer a punishable offense." Black, Handbook of American Constitutional Law (2d ed. 1897) at 597. As Judge Learned Hand explained:

> Certainly, it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it.

Falter, 23 F.2d at 425-26.

See also Hartung v. People, 26 N.Y. 167 (1863) (defendant having once been adjudged to be legally free from punishment for her offense, Act permitting her reprosecution prohibited by ex post facto clause); State v. Keith, 63 N.C. 140 (Act

purporting to revoke pardon violates Ex Post Facto Clause).

Those cases applying Dixon retroactively fail to suggest any legitimate basis to distinguish this contrary authority from analogous situations, and no such basis is apparent. Until this Court acts, therefore, these conflicting lines of analysis will cause unnecessary confusion in the lower courts.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to the Wisconsin Supreme Court should be granted.

Dated at Milwaukee, Wisconsin, May 20, 1994.

Respectfully submitted,

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APPENDIX A

OFFICIAL WISCONSIN REPORTS

State v. Kurzawa, 180 Wis. 2d 502

STATE of Wisconsin, Plaintiff-Respondent-Petitioner,

v.

Michael J. KURZAWA, Defendant-Appellant.

Supreme Court

No. 92-0926-CR. Oral argument October 19, 1993.—Decided January 12, 1994.

(Reversing and remanding 173 Wis. 2d 769, 496 N.W.2d 695 (Ct. App. 1993).)

(Also reported in — N.W.2d —.)

1. **Constitutional Law § 265*—due process clause—ex post facto protections—legislative acts and judicial pronouncements.**

   Principles underlying Ex Post Facto Clause of Due Process Clause apply to judicial pronouncements as well as to legislative acts.

2. **Constitutional Law § 274*—application of new law—violation of protections—determinations.**

   When criminal defendant raises Ex Post Facto Clause concerns with respect to application of new law, courts must look to see whether application violates one or more of that clause's recognized protections, specifically whether it criminalizes conduct that was innocent when committed, increases penalty for conduct after its commission, or removes defense that was available at time act was committed.

3. **Constitutional Law § 274*—ex post facto analysis—changes in law relative to time of allegedly illegal behavior—fundamental principle.**

*See Callaghan's Wisconsin Digest, same topic and section number.

Animating principle of Ex Post Facto Clause is that persons have right to fair warning of that conduct which will give rise to criminal penalties, premised on right to know how to conform one's conduct to law, and consequences of not doing so, at time one engages in that conduct.

4. **Constitutional Law § 274*—successive prosecutions—application of tests to conduct—double jeopardy claim.**

In appeal of court of appeals decision in embezzlement and theft by fraud case, because at time defendant engaged in conduct of which he was accused, "same elements" test was standard by which his double jeopardy would have been analyzed, applying that analysis on appeal, despite different intervening law on question of successive prosecution, did not violate defendant's due process rights.

5. **Criminal Law and Procedure § 50*—constitutional prohibition—construction—guided by United States Supreme Court.**

Generally, Wisconsin Supreme Court's construction of Wisconsin prohibition against double jeopardy is guided by rulings of United States Supreme Court.

6. **Criminal Law and Procedure § 74*—theft by fraud—uttering forged writing—separately prosecutable offenses.**

Under "same elements" test, theft by fraud and uttering forged writing are different statutory offenses and can be prosecuted in separate prosecutions, since each requires proof of element or elements which other does not (Stats §§ 943.20(1)(d), 943.38(2)).

ABRAHAMSON, J., concurs.

REVIEW of a decision of the court of appeals. *Reversed and Remanded.*

For the plaintiff-respondent-petitioner the cause was argued by *Sharon Ruhly,* assistant attorney gen-

*See Callaghan's Wisconsin Digest, same topic and section number.

eral, with whom on the briefs was *James E. Doyle,* attorney general.

For the defendant-appellant there were briefs by *Stephen M. Glynn, Robert R. Henak* and *Shellow, Shellow & Glynn, S.C.,* Milwaukee and oral argument by *Robert R. Henak.*

JON P. WILCOX, J. This is a review under sec. (Rule) 809.62, Stats., of a published decision of the court of appeals[1] reversing Walworth County Circuit Court Judge James L. Carlson's determination that the state's attempt to prosecute the defendant, Michael J. Kurzawa (Kurzawa) in Walworth County on 54 counts of forgery did not violate Kurzawa's constitutional protection against being placed twice in jeopardy for the same offense. Because we believe the Walworth County prosecution does not violate Kurzawa's constitutional rights, we reverse and remand.

Background

This appeal has a complicated and lengthy history. In 1977, Dr. Robert Beckes and his wife, Dr. Clarice Beckes, each established their own medical practice in the city of Milwaukee. Beginning in 1977, and continuing until some time in 1986, Kurzawa provided professional services in connection with the business aspects of the Beckes' practices. He was instrumental in the initial set-up of the offices. He also provided ongoing assistance in such areas as personnel decisions, the development of marketing strategies, bill-paying, and general bookkeeping responsibilities. The performance of these services allowed Kurzawa access

[1] *State v. Kurzawa,* 173 Wis. 2d 769, 496 N.W.2d 695 (Ct. App. 1993).

to the Beckes' business checking accounts and bank records.

All of the criminal charges against Kurzawa, first in Milwaukee County, and later in Walworth County, stem from allegations that during this period he signed and made payable to himself checks drawn against the Beckes' business checking accounts. These checks were discovered during the course of an audit requested by Robert Beckes in 1986 after he had grown concerned over his practice's financial condition.

That audit revealed that Kurzawa had signed the name of either Robert or Clarice Beckes on checks drawn against their business accounts with the Greater Milwaukee Bank. Many of these checks were payable to parties other than Kurzawa, and apparently went towards legitimate business expenses. In other instances, however, Kurzawa signed checks made payable either to himself or his business. The Beckes claim that Kurzawa was not entitled to those assets. It is conceded by all parties that Kurzawa was not authorized to sign checks on these accounts.

Following an investigation by the forgery unit of the Milwaukee Police Department, Kurzawa was charged in Milwaukee County with one count of embezzlement, contrary to secs. 943.20(1)(b) and (3)(c), Stats. Shortly before trial, the criminal information was amended so as to charge Kurzawa with two counts of theft by fraud, where the value of the property exceeds $2,500, in violation of secs. 943.20(1)(d) and (3)(c). Count one of the amended information involved the property of Dr. Robert Beckes; count two involved the property of Dr. Clarice Beckes.

The theft by fraud charges against Kurzawa went to trial on September 25, 1990. Following the state's presentation of its case-in-chief, Judge William D.

Gardner granted Kurzawa's motion for acquittal on all charges. Judge Gardner based his order on what he regarded as several flaws in the prosecution's legal theory of the case.[2] The merits of the case did not go to the jury.

Then, by criminal complaint dated April 10, 1991, Kurzawa was charged in Walworth County with 54 counts of uttering a forged writing (forgery), in violation of sec. 943.38(2), Stats. Each count arises from a separate check written on the business account of either Robert or Clarice Beckes. The 54 checks in question were written during a time that spanned April 16, 1985 to March 24, 1986. There is no question but that these 54 checks were among those checks that served as the basis for the prior Milwaukee County theft by fraud prosecution.

On October 18, 1991, Kurzawa moved the Walworth County Circuit Court to dismiss the charges against him on double jeopardy grounds. Essentially, his argument was that under the analysis articulated in *Grady v. Corbin,* 495 U.S. 508, (1990), he had already been prosecuted for this offense in the Milwaukee County theft by fraud trial. Judge Carlson

[2]Specifically, the Wisconsin theft by fraud statute, sec. 943.20(1)(d), Stats., requires that a false representation be made either to the owner of the property or the owner's agent. Wis. J I—Criminal 1453. The state attempted to prove that Kurzawa's false representations were made to the Beckes' financial institution, the Greater Milwaukee Bank. Judge Gardner determined that the relationship between depositor and financial institution is one of creditor/debtor, not principal/agent. Therefore, the state failed to prove an essential element of the crime. Judge Gardner's analysis in this respect is not a subject of this appeal.

dismissed Kurzawa's motion, and ordered the Walworth County prosecution to proceed.

Kurzawa appealed Judge Carlson's non-final order to the court of appeals. Following an unsuccessful attempt to certify the issue to the Wisconsin Supreme Court, the court of appeals reversed Judge Carlson's order, and remanded the case with instructions to dismiss the criminal complaint.

In the court of appeals' view, the Walworth County forgery prosecution failed *Grady's* double jeopardy analysis. The opinion's author, Judge Nettesheim, noted that *Grady* established a new two-step analysis for "successive prosecution" cases such as Kurzawa's. In the first step, the inquiry is whether the second prosecution passes the "same elements" test of *Blockburger v. United States,* 284 U.S. 299 (1932). That test asks whether each offense, "requires proof of a fact which the other does not." *Id.* at 304. Applying that test, the court of appeals compared the statutory elements of theft by fraud, sec. 943.20(1)(d), with those of forgery, sec. 943.38(2), and found that they survived *Blockburger* because, "they neither have identical statutory elements, nor is one the lesser-included of the other." *Kurzawa,* 173 Wis. 2d at 775.

The court then proceeded to the second inquiry under *Grady,* one it characterized as whether, "to establish an essential element of an offense charged . . . the state will attempt to prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 776. In its analysis, the court of appeals had the benefit of a series of stipulations made by the parties. In one such stipulation, the state acknowledged that in the Milwaukee County prosecution, it sought to establish the element of 'false representation' by proving that Kurzawa obtained

money from the Beckes' accounts by forging their names as the purported makers of the checks and naming himself as payee. The court then compared that fact with the following stipulations regarding the conduct the state intended to rely upon in the Walworth County forgery prosecution:

1) Between a date prior to May, 1983 and the end of March, 1986, Mr. Kurzawa wrote a number of checks to himself or his business on the Beckes' business accounts, forging their names as the drawers of the checks. These checks included the checks which are set forth in Counts 1 through 54 of this information.

2) Mr. Kurzawa presented the checks set forth in Counts 1 through 54 of the information for cashing or deposit into accounts held in his name at the Walworth State Bank in Walworth County, Wisconsin.

3) Neither Dr. Robert Beckes nor Dr. Clarice Beckes gave the defendant permission to make the checks, to sign their names to the checks, or to present the checks for cashing anywhere. *Id.*

The court of appeals found that these stipulations revealed that the state was attempting to prosecute Kurzawa for the same "core conduct" in successive prosecutions. This, the court concluded, was precisely what *Grady* forbids. *Id.*

Judge Nettesheim also wrote a separate concurrence wherein he questioned the continuing vitality of *Grady,* particularly in light of the Supreme Court's subsequent holding in *United States v. Felix,* — U.S. —, 112 S. Ct. 1377 (1992), and the Wisconsin Supreme Court's post-*Grady* decision, *State v. Sauceda,* 168 Wis. 2d 486, 485 N.W.2d 1 (1992). *Kurzawa,* 173 Wis. 2d at 777, 778–79 (Nettesheim, J., concurring). Judge Nettesheim recognized that *Sauceda* dealt with the situation where multiple offenses are tried in a single

prosecution, while *Grady* was addressed to instances of successive prosecutions. Nonetheless, he felt that *Sauceda*, which relied almost exclusively on a *Blockburger* analysis, and *Grady* could lead to unjustifiably disparate results. *Id.* at 780.

In April of 1993, we agreed to hear the state's appeal of the court of appeals decision, and scheduled oral arguments for September of that year. In the interim, on June 28, 1993, the United States Supreme Court overturned its barely three-year-old *Grady* decision in *United States v. Dixon*, — U.S. —, 125 L. Ed. 2d 556 (1993). In *Dixon*, five justices criticized *Grady* for what they viewed as that decision's lack of historical grounding and its demonstrated unworkability in practice. *Id.* at 573–76. These same five justices further rejected the idea, which lay at the heart of *Dixon*, that the double jeopardy clause required a different method of analysis for cases involving successive prosecutions than it did for multiple punishment cases. *Id.* at 573. The *Dixon* majority returned to *Blockburger's* "same elements" test for virtually all double jeopardy questions. *Id.*

Kurzawa concedes that under *Blockburger*, the Walworth County forgery prosecution can proceed. Still, he advances three arguments why *Blockburger* should not be the test for his double jeopardy claims. First, he maintains that *Dixon*, and its return to *Blockburger's* "same elements" test cannot be retroactively applied to his case because such an application violates ex post facto principles embodied in the Due Process Clause. Second, he argues that even if *Dixon* can be applied without violating due process, this court should nonetheless reject its approach. He insists that *Dixon* was wrongly decided, and that we should adopt a *Grady*-like "same conduct" double jeopardy approach

in successive prosecution cases. Finally, he argues that under Supreme Court precedent predating both *Grady* and *Dixon*, his Walworth County prosecution is barred on double jeopardy grounds. We discuss each of these arguments in turn.

I.

Kurzawa's first argument is that retroactive application of *Dixon's* double jeopardy analysis to his case violates the ex post facto protections embodied in the Due Process Clause. His reasoning is that at the time of his Milwaukee County prosecution, *Grady*, decided on May 29, 1990, was the prevailing law of double jeopardy. According to Kurzawa, the state cannot, consistent with *Grady*, prosecute him for that "same conduct" again in Walworth County. In other words, Kurzawa believes that as of the date of his Milwaukee County acquittal, *Grady* provided him with a double jeopardy defense to the Walworth County forgery charges. He concedes that such a defense does not exist under *Dixon*. As a result, *Dixon*, if applied retroactively, exposes him to punishment from which he was previously immune. Such an "after the fact" increase in punishment, he believes, violates ex post facto principles.

The state, for its part, gives short shrift to Kurzawa's ex post facto arguments. It maintains that under *Griffith v. Kentucky*, 479 U.S. 314 (1987), new rules with respect to criminal prosecutions can always be applied retroactively to cases in the direct appeal "pipeline." In this case, the "new rule" is *Dixon's* return to the double jeopardy analysis of *Blockburger*. Because this new rule was announced while Kurzawa's case was in the "pipeline," it can automatically be applied to Kurzawa.

[1]

We begin by noting that the principles underlying the Ex Post Facto Clause apply to judicial pronouncements as well as to legislative acts. As the Supreme Court has stated:

> The ex post facto clause is a limitation upon the powers of the legislature . . . and does not on its own force apply to the Judicial Branch of Government. But the principle on which the clause is based-the notion that persons have a right to have fair warning of that conduct which will give rise to criminal penalties-is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.

Marks v. United States, 430 U.S. 188, 192 (1977). *See also, Bouie v. City of Columbia,* 378 U.S. 347 (1964). Accordingly, our task is to determine whether the application of *Dixon's* analysis in this case violates ex post facto principles, thereby depriving Kurzawa of due process.

The United States Supreme Court has on various occasions articulated the protections afforded by the Ex Post Facto Clause:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Beazell v. Ohio, 269 U.S. 167, 169–170 (1925). *See also, Collins v. Youngblood*, 497 U.S. 37, 42 (1990).

The Supreme Court's discussion in *Marks* illustrates these principles. The *Marks* defendants faced charges arising from their transport of allegedly obscene materials. This conduct continued through February 27, 1973. *Marks*, 430 U.S. at 189–190. Their trial was set for the following October. On June 21, 1973, the United States Supreme Court decided *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the court adopted a broader definition of obscenity than that which it had espoused earlier in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The issue in *Marks* centered on which definition of obscenity should be applied: the *Memoirs* standard, or the more inclusive *Miller* standard.

The Supreme Court held that the *Marks* defendants could not, consistent with due process, be prosecuted under the new, tougher *Miller* standard. *Marks*, 430 U.S. at 196. The reason was that at the time they engaged in their allegedly illegal behavior, *Memoirs*, not *Miller*, was the law. Because the new *Miller* standard criminalized conduct that was innocent when committed, it could not be retroactively applied to those defendants. *Id.*

Marks also reveals why the state's reliance on *Griffith's* "pipeline" theory of retroactivity can be misplaced when ex post facto concerns are raised. In *Marks*, the new rule at issue, the broader *Miller* obscenity standard, was announced while the case was in the direct appeal "pipeline." Nevertheless, the Supreme Court held that applying that new standard retroactively violated the defendants' due process rights. This reasoning conflicts with the state's expansive application of *Griffith* to ex post facto analysis.

[2]

When a criminal defendant raises Ex Post Facto Clause concerns with respect to the application of new law, courts must look to see whether the application violates one or more of that clause's recognized protections. Specifically, the court must determine whether the new law criminalizes conduct that was innocent when committed, increases the penalty for conduct after its commission, or removes a defense that was available at the time the act was committed. *Collins*, 497 U.S. at 52. Only when these protections are not violated does *Griffith* allow retroactive application.

[3]

Kurzawa claims that retroactive application of *Dixon* violates the ex post facto protection against increased punishment because under the double jeopardy analysis of *Grady*, he could not have been prosecuted in Walworth County for the "same conduct." Kurzawa's argument ignores one of the fundamental aspects of ex post facto analysis, that being its focus on changes in the law relative to the time of the defendant's allegedly illegal behavior. That focus arises from the clause's animating principle, namely that "persons have a right to fair warning of that conduct which will give rise to criminal penalties. . . ." *Marks*, 430 U.S. at 192. This principle, "fundamental to our concept of constitutional liberty," *Id.*, is premised on the right to know how to conform one's conduct to the law, and the consequences of not doing so, at the time one engages in that conduct.[3] This explains why ex post facto analysis is concerned with changes in the law relative to the

[3] "It is accepted as an axiom of American constitutional law that failure to give a defendant fair warning of the consequences of his conduct, when such conduct is determined to be unlawful only after the fact, provides a constitutional defense." *Waukesha*

time the defendant engaged in his allegedly illegal behavior.

It also explains why Kurzawa's reliance on *Grady* itself is misplaced. The conduct for which Kurzawa faces prosecution in Walworth County occurred no later than March of 1986. *Grady* was not decided until May of 1990, more than four years later. *Dixon*'s rejection of *Grady* in and of itself cannot support an ex post facto clause defense.[4]

The real question with respect to Kurzawa's due process/ex post facto arguments is whether *Dixon* exposes him to a prosecution, and therefore punishment, from which he would have been free under the law as it existed at the time of his alleged acts, or whether it merely restored double jeopardy analysis to the state that existed at that time. Our examination of Supreme Court precedent in this area leads us to believe that the latter is true. As a result, we reject those arguments.[5]

Memorial Hospital v. Baird, 45 Wis. 2d 629, 636, 173 N.W.2d 700 (1970).

[4] Kurzawa's reliance on *Rubino v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988), is similarly unavailing. In *Rubino*, the new judicial interpretation removed a defense that had been available to the defendant when he allegedly committed his offenses. *Id.* at 1268.

[5] We note that *Collins*, decided in 1990, casts considerable doubt as to whether, in future cases, changes in the law of double jeopardy will in any event support an ex post facto argument. In *Collins*, the Supreme Court appeared to confine ex post facto violations to "alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.' " *Collins*, 497 U.S. 37, 50, *quoting Beazell*, 269 U.S. at 169–170. Prior to *Collins*, the ex post facto clause apparently embraced any change which "altered the situation of a party to his disadvantage." *Collins*, 497 U.S. at 50. We need not

The Fifth Amendment's Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The clause has been construed to encompass three separate constitutional protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969). We will refer to the first two of these as protections against "successive prosecutions" and the third as protection from "multiple punishments."

There can be no dispute that in cases involving multiple punishments in a single prosecution, *Blockburger's* "same elements" test is the accepted method for determining which offenses are the same for double jeopardy clause purposes. *See, Sauceda*, 168 Wis. 2d at 489. Under *Blockburger*, the inquiry is whether each offense contains a statutory element not contained in the other; if not, they are the same for double jeopardy

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decide whether changes in double jeopardy law qualify under either of these standards because our decision today is based on the determination that *Dixon* merely places Kurzawa in the position he faced when he engaged in his suspect activity. "It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law." *Miller v. Florida*, 482 U.S. 423, 431 (1987).

Last term, in *State v. Koch*, 175 Wis. 2d 684, 499 N.W.2d 152 (1993), we relied on *Griffith* to retroactively apply the new "48-hour" rule announced in *County of Riverside v. McLaughlin*, — U.S. —, 111 S. Ct. 1661 (1991). Such reliance was proper in that case because retroactive application of that new rule did not violate any ex post facto protections.

purposes and multiple punishments are prohibited. *Blockburger,* 284 U.S. at 304.

The task before the court in *Grady* and *Dixon,* though, was to define the appropriate double jeopardy analysis for cases such as Kurzawa's that involve successive prosecutions. In *Dixon,* five justices, led by Justice Scalia, held that *Blockburger* was the correct analysis in such cases. These justices believed that *Grady's* "same conduct" approach was "wholly inconsistent with earlier Supreme Court precedent . . ." and that "there is *no* authority except *Grady* for the proposition that it [the term 'same offense'] has different meanings in the two contexts." *Dixon,* — U.S. —, 125 L. Ed. 2d. at 573 (emphasis in original).

We agree that prior to *Grady, Blockburger's* "same elements" test was the prevailing law for all double jeopardy claims, including those involving successive prosecutions. As a result, *Dixon's* return to *Blockburger* merely places Kurzawa in precisely the same position he faced when he engaged in the conduct at issue. A review of the cases relied upon by *Grady* to support its two-step "same conduct" approach confirms our view. With one possible exception, none of those cases provide any direct support for *Grady.* Rather, they all rely on a *Blockburger*-type analysis.

In *Brown v. Ohio,* 432 U.S. 161 (1977), the Supreme Court held that a defendant who had already been convicted for "joyriding" could not subsequently be prosecuted for auto theft. Under Ohio law, conviction for joyriding required proof that the defendant did "purposely take, operate, or keep any motor vehicle without the consent of the owner." *Id.* at 162 n.1. The auto theft statute, on the other hand, simply stated that, "No person shall steal any motor vehicle." *Id.* at 163 n.2. There was no dispute that the two prosecu-

tions arose from the same conduct. Citing the Ohio Court of Appeals' determination that joyriding was a lesser-included offense of auto theft, the Supreme Court held that the auto theft prosecution violated double jeopardy. In so doing, the Court relied strictly on a *Blockburger* "same elements" test. *Id.* at 168.[6]

Grady also tried to draw support for its "same conduct" from the holding in *Ashe v. Swenson*, 397 U.S. 436 (1970). In *Ashe*, the jury at the initial trial found that the defendant was not one of the robbers participating in the hold-up of a poker game. The Supreme Court held that resolution of that issue to the defendant's benefit in the first trial estopped the state from relitigating that same issue at a second trial involving a different victim of that same robbery. *Id.* at 445. The court's decision in *Ashe* was grounded in the law of collateral estoppel as applied to previously litigated facts. As such, *Ashe* provides little if any support to *Grady's* double jeopardy approach, especially in cases such as Kurzawa's where the merits of the case never reached the jury.[7]

[6] In *Grady*, Justice Brennan's majority opinion cites language contained in a *Brown* footnote (*Brown*, 432 U.S. at 166–67 n.6), to support the argument that something other than *Blockburger* is required in successive prosecution cases. *Grady*, 495 U.S. at 519. We do not find Justice Brennan's reliance on that footnote persuasive in that it is pure dictum, and does nothing to alter the fact that in *Brown*, a case involving successive prosecutions arising from the same conduct, the court applied a *Blockburger*-type analysis.

[7] Although *Ashe* did conclude that collateral estoppel principles were embodied in the Double Jeopardy Clause, *Ashe*, 397 U.S. at 445, the decision's focus on collateral estoppel rather than double jeopardy is revealed in the opinion's following observation:

A third case relied upon by *Grady* is *Harris v. Oklahoma*, 433 U.S. 682 (1977). In *Harris*, the defendant was convicted of felony murder in connection with the robbery of a grocery store. The Oklahoma Court of Criminal Appeals determined that proof of the underlying felony, armed robbery, was necessary to prove the requisite intent for felony murder. *Id.* at 682. In a brief per curiam decision, the Supreme Court held that Harris's subsequent prosecution for the underlying felony of armed robbery was barred by the Double Jeopardy Clause. *Id.*

In *Dixon*, Justice Scalia maintained that *Harris* is completely consistent with a *Blockburger* analysis because the underlying substantive offense was actually just a lesser-included offense of the greater crime. *Dixon*, — U.S. —, 125 L. Ed. 2d at 574–75. In other words, felony murder could not have been proved without also proving the lesser crime, armed robbery. We agree with that analysis, and with the conclusion that *Harris* reflects a *Blockburger*-type analysis.

Illinois v. Vitale, 447 U.S. 410 (1980), represents another successive prosecution case where the Supreme Court applied a *Blockburger* analysis. The defendant in *Vitale* was first convicted for failure to reduce speed in connection with his role in an auto accident. *Id.* at 412. Later, the state charged him with involuntary manslaughter with a motor vehicle, proof of which requires "reckless operation of a motor vehi-

The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again. *Id.* at 446.

cle." *Id.* at 416–17. The Illinois Supreme Court, relying on *Brown,* held that failure to reduce speed was a lesser-included offense of involuntary manslaughter because the recklessness element of involuntary manslaughter could be established by proving a reckless failure to reduce speed. *Id.* at 417.

The United States Supreme Court reversed. Applying a very strict *Blockburger* analysis, the court focused exclusively on the statutory elements of the two offenses, and determined that because it was possible to prove involuntary manslaughter without proving a failure to reduce speed, the latter was not a lesser-included of the former. *Id.* at 418–19. The court distinguished *Brown* on the grounds that in that case, "the prosecutor who had established auto theft necessarily has established joyriding as well." *Id.* at 417.

The majority opinion in *Grady* ignored that fact. Instead, it focused on *Vitale's* suggestion that if, in the involuntary manslaughter prosecution, the state in fact relied on the failure to reduce speed to prove the recklessness element of involuntary manslaughter, the defendant would have a "substantial" double jeopardy argument. *Grady,* 495 U.S. at 515–16. Again, we believe *Grady* makes too much of this dicta. As Justice Scalia pointed out in *Dixon,* the suggestion in *Vitale* does not say that the defendant would have a "winning" argument should that occur, only that he would have a substantial one. *Dixon,* — U.S. —, 125 L. Ed. 2d at 575.

In fact, the only case relied on by *Grady* that may illustrate the application of something other than a *Blockburger* analysis is the nineteenth century case, *In re Nielsen,* 131 U.S. 176 (1889). In *Nielsen,* the defendant was first convicted of unlawful cohabitation with two women, and then convicted of adultery with one of the women the following day. *Id.* at 185. The Supreme

Court granted defendant's petition for habeas corpus relief on the grounds that the adultery prosecution violated the double jeopardy clause.

It is not clear exactly what analysis the *Nielsen* court applied to that defendant's double jeopardy claim.[8] In any event, we believe *Nielsen* is exceedingly weak authority for *Grady's* "same conduct" approach. First, we note the opinion's obvious age and lack of clarity. Second, we are aware of at least one double jeopardy case from roughly the same period, also involving successive prosecutions arising from the same conduct, where the Supreme Court relied solely on a *Blockburger*-type analysis without even mentioning *Nielsen*. *Gavieres v. United States*, 220 U.S. 338 (1911).[9]

[8] Five justices in *Grady* maintained that the prosecutions for adultery and unlawful cohabitation each required proof the other did not. *See, Grady*, 495 U.S. at 519. Apparently, they believed that unlawful cohabitation required proof of cohabiting with two or more women while adultery did not, and that adultery required proof of marriage while unlawful cohabitation did not.

In *Dixon*, five justices believed that *Nielsen* was consistent with a *Blockburger* analysis, and that the court in *Nielsen* barred the adultery prosecution only after it determined that adultery was simply a lesser-included offense of unlawful cohabitation. *Dixon*, — U.S. —, 125 L. Ed. 2d at 573–74.

Commentators have remarked on *Nielsen's* lack of clarity in this respect. *See, e.g.*, Eli J. Richardson, *Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 Vand. L. Rev. 273, 295 n.155 (concluding that, "in fact, it is difficult to determine the exact basis for *Nielsen*").

[9] In *Gavieres*, the Supreme Court cited with approval the following language from an earlier Massachusetts case, *Morey v. Commonwealth*, 108 Mass. 433 (1871):

Finally, we note that in *State v. Brooks*, 215 Wis. 134, 254 N.W. 374 (1934), this court specifically limited *Nielsen* to its "peculiar circumstances," and applied a strict "same elements" test to the state's attempt at successive prosecutions. *Id.* at 139. In *Brooks*, the question was whether the defendant's prior conviction for lewd and lascivious behavior barred a subsequent prosecution for adultery. The court determined that the offenses were not the same for double jeopardy purposes because, "there are distinct elements in one which are not included in the other, though both relate to one transaction." *Id.* at 140.

[4]

To summarize, dictum in several Supreme Court cases prior to *Grady* does express the sentiment that an approach other than *Blockburger* is required when successive prosecutions are attempted. We nonetheless agree with *Dixon's* conclusion that prior to *Grady*, *Blockburger* was the law for determining which offenses were the same in such cases.[10] In fact, *Grady*

The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment from the other. *Gavieres*, 220 U.S. at 342.

[10] A number of commentators agree with our conclusion that *Grady* represented a significant break with past Supreme Court precedent. See, e.g., Craig J. Webre, *Grady v. Corbin: Successive Prosecutions Must Survive Heightened Double Jeopardy Protection*, 36 Loy. L. Rev. 1171, 1182 (1991) ([*Grady*] is significant in that it alters nearly sixty years of established precedent."); Diane M. Resch, *"High Comedy but Inferior Justice": The Aftermath of Grady v. Corbin*, 75 Marq. L. Rev. 265, 273 (1991) ("The rule of law articulated in *Grady v. Corbin* is a

itself seems to recognize this distinction between sentiment and law when it speaks of adopting the "suggestion" set forth in *Vitale* dicta. *Grady*, 495 U.S. at 510. Accordingly, we believe that at the time Kurzawa engaged in the conduct for which he stands accused, *Blockburger's* "same elements" test was the standard by which his double jeopardy claim would have been analyzed. We conclude, therefore, that applying such an analysis now does not violate his due process rights.

II.

Kurzawa next argues that irrespective of ex post facto considerations, this court should reject *Dixon* because it was wrongly decided. Kurzawa urges us, rather, to interpret the Wisconsin Constitution's Double Jeopardy Clause so as to provide broader protections for defendants such as himself that face successive prosecutions.

Kurzawa's arguments with respect to the wisdom of *Dixon* virtually mirror those advanced by Justice Brennan in *Grady*, and Justice Souter in his *Dixon* dissent. *Dixon*, — U.S. —, 125 L. Ed. 2d 556, 598 (Souter, J., dissenting.) We see little need to reiterate those arguments, or for that matter, the counter arguments championed by Justice Scalia in both those cases.

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dramatic expansion of the *Blockburger* test."); Eli J. Richardson, *Matching Double Jeopardy Violations with Constitutional Interests*, 45 Vand. L. Rev. 273, 296 (1991) (concludes that *Grady* is unsupported by earlier Supreme Court precedent); Sara Barton, *Grady v. Corbin: An Unsuccessful Attempt To Define 'Same Offense,'* 25 Ga. L. Rev. 143, 155 (1990) (observes that not until *Grady* did Justice Brennan succeed in removing *Blockburger's* "almost exclusive hold over the definition of 'same offense' ").

[5]

Generally, this court's construction of Wisconsin's prohibition against double jeopardy is guided by the rulings of the United States Supreme Court. *State v. Barthels,* 174 Wis. 2d 173, 181, 495 N.W.2d 341 (1993). We believe that *Grady,* and its "same conduct" approach to double jeopardy analysis, is a poor candidate for persuading us to deviate from that course. During its brief life span, *Grady* was heavily criticized for being unsupported by precedent, for allowing unjust results,[11] and for proving unworkable in practice.[12] To this list, we would add *Grady's* infidelity to

[11] This criticism generally arises in light of the outcome in *Grady* itself. In *Grady,* the defendant, while intoxicated, drove his vehicle across the center line, striking two oncoming vehicles, killing one of the drivers. *Grady,* 495 U.S. at 511. He was charged and pled guilty to two misdemeanor traffic tickets, one for crossing the center line, and the other for driving while intoxicated. *Id.* at 512–13. Subsequently, the state attempted to prosecute him for criminally-negligent homicide. Attendant to that prosecution the state submitted a bill of particulars that said it intended to rely on the traffic offenses to prove the homicide charges. *Id.* at 514–15. The Supreme Court held that the homicide prosecution violated the Double Jeopardy Clause because, "the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted-driving while intoxicated and failing to keep right of the median-to establish essential elements of the homicide and assault charges." *Id.* at 523.

[12] See, *United States v. Felix,* — U.S. —, 112 S. Ct. 1377, 1383–84 (1992), wherein the Supreme Court was forced to back away from a "literal" reading of *Grady,* "because of difficulties which have already arisen in its interpretation."

See also, Craig J. Webre, *Grady v. Corbin: Successive Prosecutions Must Survive Heightened Double Jeopardy Protection,* 36 Loy. L. Rev. 1171, 1185 (1991) ("Certainty, simplicity, and

the language of the Double Jeopardy Clause itself, which prohibits successive prosecutions of the "same offense," not the "same conduct," as another reason not to adopt its methodology.[13]

We believe that *Blockburger,* and the case law developed around it, adequately protect the interests embodied in the Double Jeopardy Clause. Under *Blockburger,* the state cannot successively prosecute a defendant for two offenses unless each offense necessarily requires proof of an element the other does not. Neither can the state prosecute an offense whose elements are "incorporated" into the elements of an offense already prosecuted. *Dixon,* — U.S. —, 125 L. Ed. 2d at 569. Finally, the state cannot relitigate factual issues that have already been adjudicated to the defendant's benefit in an earlier prosecution. *Ashe,* 397 U.S. at 446. These protections ensure that defendants

justice could have been achieved by retaining the traditional *Blockburger* test as the exclusive means of defining the 'same offense' in successive prosecutions. . . ."); *and,* Diane M. Resch, *"High Comedy but Inferior Justice": The Aftermath of Grady v. Corbin,* 75 Marq. L. Rev. 265, 281 (1991) ("Historically, the *Blockburger* test has served as an objective and practical framework by which to determine whether the Double Jeopardy Clause bars a subsequent prosecution. Whatever shortcomings the *Blockburger* test may have had, *Grady v. Corbin* does not remedy them.").

[13] Kurzawa also argues that we should construe the Double Jeopardy Clause of the Wisconsin constitution more broadly than its federal counterpart based on the Preamble to our state constitution, which, he argues, evinces a greater emphasis on "the blessings of freedom" than it does on the "general welfare." Without deciding the precise merits of Kurzawa's constitutional analysis, we reject his reasoning because our holding today does nothing to jeopardize the "blessings of freedom" ensured the citizens of this state.

will not be forced to unfairly "run the gauntlet" a second time for the same offense.

Of course, we recognize that the Double Jeopardy Clause's prohibition against "successive prosecutions" protects different interests than does its prohibition against "multiple punishments."[14] Still, we do not believe that these different interests necessarily require or even recommend separate analyses. *Blockburger's* emphasis on statutory elements is simple and objective. It provides defendants, courts, and prosecutors certainty as to which offenses are the same for double jeopardy purposes. Moreover, it is the approach that best comports with the language of the double jeopardy clause. *Blockburger* is not a perfect test, but it is better than *Grady's* "same conduct" approach. We hereby follow the United States Supreme Court and adopt the analysis of *Dixon* and *Blockburger* in double jeopardy cases involving successive prosecutions.

[6]

Under a *Blockburger* "same elements" test, theft by fraud, sec. 943.20(1)(d), Stats., and uttering a forged

[14] In *Grady,* Justice Brennan argued that the interests underlying the Double Jeopardy Clause's protection against successive prosecutions went beyond that Clause's protection against multiple punishments:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.

Grady 495 U.S. at 518, quoting *Green v. United States,* 355 U.S. 184, 187 (1957).

Justice Brennan also noted that successive prosecutions, "give the State an opportunity to rehearse its proof, thus increasing the risk of an erroneous conviction . . . ." *Id.*

writing, sec. 943.38(2), are different offenses, and can be prosecuted in separate prosecutions. Kurzawa does not dispute that fact. Comparing the statutory elements of the two offenses, it is clear that each requires proof of an element or elements which the other does not.[15] Most significantly, theft by fraud requires proof that the defendant intended to deceive and defraud the owner, and that the owner was in fact deceived and defrauded. Forgery does not. Forgery requires proof that the defendant forged a writing, and that the writing was one "by which legal rights or obligations are created or transferred." Theft by fraud does not. Since

[15] The statutory elements of theft by fraud, sec. 943.20(1)(d), Stats., are:

First, that the defendant made a false representation to the owner of the property.

Second, that the defendant knew that such representation was false

Third, that the defendant made such representation with intent to deceive and to defraud the owner of the property.

Fourth, that the defendant obtained title to the property of the owner by such false representation.

Fifth, that the owner of the property was deceived by such representation.

Sixth, that the owner of the property was defrauded by such representation.

Wis. J I—Criminal 1453.

The statutory elements of uttering a forged writing under sec. 943.38(2), Stats., are:

First, that the writing was one by which legal rights or obligations are created or transferred.

Second, that the writing was falsely made.

Third, that the defendant uttered the writing as genuine.

Fourth, that the defendant knew the writing was falsely made.

Wis. J I—Criminal 1492.

the two offenses each require proof of an element the other does not, they survive *Blockburger* analysis, and they can be prosecuted separately.

III.

In his final argument, Kurzawa seeks to characterize the Walworth County forgery prosecution as falling under the "incorporation" species of lesser-included offenses, exemplified by the pre-*Grady* case, *Harris*. We do not agree with Kurzawa's arguments in that regard. The Supreme Court has made clear that its holding in *Harris* was premised on the fact that a conviction for the "greater offense" in that case, felony murder, necessarily required proof of all the elements of the "lesser offense," armed robbery. *Dixon,* — U.S. —, 125 L. Ed. 2d at 574. In other words, the statutory definition of felony murder "incorporated" the underlying offense of armed robbery. This led the court to conclude that for double jeopardy purposes, felony murder was not a "separate offense distinct from its various elements." *Vitale,* 447 U.S. at 420.[16]

[16] In *Dixon,* Justice Scalia and Justice Kennedy applied a similar "incorporation" analysis to bar several prosecutions in that case. This is illustrated in their approach to defendant Dixon's double jeopardy claims. As a condition of his release pending his murder trial, Dixon was warned that "any criminal offense" would subject him to among other things, prosecution for contempt of court. While out on bond, Dixon was arrested for possession of cocaine with intent to deliver. As a result, he was found guilty of criminal contempt. Justices Scalia and Kennedy would have barred his prosecution on the cocaine charges because the drug offense "did not include any element not contained in his previous contempt offense. . . ." *Dixon,* 125 L. Ed. 2d at 570.

That is not the case with these offenses. As shown above, a theft by fraud conviction does not necessarily require proof of all the elements of forgery. In that regard, Kurzawa's case is more analogous to the situation in *Vitale,* where the court allowed the prosecution for involuntary vehicular manslaughter because that offense did not always require proof of failure to reduce speed, the offense for which Vitale had previously been convicted. *Id.* at 419. It is true that in *Vitale,* the court "suggested" that the state's reliance on Vitale's failure to reduce speed to prove involuntary manslaughter would give Vitale a "substantial" double jeopardy argument. *Id.* at 421. In *Dixon,* the Supreme Court overruled *Grady* and decided that that "substantial" claim was not a winning claim. So it is with Kurzawa's double jeopardy arguments. We believe that the state's attempt to prosecute Kurzawa in Walworth County does not violate the Double Jeopardy Clause. Accordingly, we reverse the decision of the court of appeals, and remand this case to the circuit court for further proceedings not inconsistent with this opinion.

By the Court.—The decision of the court of appeals is reversed and the case is remanded to the circuit court.

SHIRLEY S. ABRAHAMSON, J. *(concurring).* I join the majority opinion because I conclude that it has properly applied the *Blockburger* test endorsed by *United States v. Dixon,* 61 LW 4835 (1993), the United States Supreme Court's most recent pronouncement on double jeopardy.

I write separately because I believe it is time for the court to take a fresh look at double jeopardy. As the justices of the United States Supreme Court have

openly acknowledged, federal double jeopardy jurisprudence is in disarray. The double jeopardy clause in the federal constitution has become encrusted with numerous conflicting decisions and interpretations. The 5–4 *Dixon* decision, which overruled a 5–4 decision rendered barely three years earlier,[1] produced five opinions with the justices joining and rejecting various portions of each other's opinions. When it requires a chart to determine which paragraphs of a United States Supreme Court decision constitute the law of the land, you know you are in trouble.

Rather than commit ourselves to this federal labyrinth, this court and the lawyers who appear before it should return to the words of the Wisconsin Constitution.[2] We must look anew at our state constitution's double jeopardy clause and the nineteenth and early twentieth century decisions interpreting it. We must attempt to fashion a workable application of our double jeopardy clause that remains true to its purposes.

Were framing such a test an easy task, no doubt the United States Supreme Court would have unraveled its snarled jurisprudence long ago. However, state courts cannot abdicate the responsibility for developing

[1] *Grady v. Corbin*, 495 U.S. 508 (1990), was the case overruled.

The majority concludes, as did Justice Scalia in *Dixon*, that *Grady v. Corbin* had no support from prior cases. As long as this court is applying federal constitutional law to this case, I feel bound by Justice Scalia's interpretation adopted by the majority's opinion but I think that Justice Souter's analysis of these earlier cases in *Dixon* is more persuasive.

[2] Article I, section 8(1) of the Wisconsin Constitution provides that: ". . . no person for the same offense may be put twice in jeopardy of punishment. . . ." The state and federal constitutional provisions are not identical.

a modern approach to double jeopardy. Enforcing constitutional rights is as much the responsibility of state courts as it is the federal courts. After all, the vast majority of criminal prosecutions across the country are brought in state courts using state statutes.

I.

Simply stated, the problem is this: What test for multiple prosecutions will protect the individual from the burden of defense against serial prosecutions for essentially the same conduct without unfairly hampering the state in prosecuting and convicting the guilty?

The United States Supreme Court's 1932 *Blockburger* opinion represents one attempt to solve this problem. As the majority opinion explains, the *Blockburger* test attempts to distinguish among offenses by comparing the elements required for proof of each crime. Generally a subsequent prosecution may go forward if it requires proof of an additional element.

Today the *Blockburger* test still serves well as an initial inquiry, but it is not sufficiently refined to cope with the plethora of criminal statutes now crowding the statute books. In this case, for example, the very same forged checks could be used as the basis for prosecutions under at least two state criminal statutes. When the state lost its case under one statute, a second case was brought under another.

It is not unusual in Wisconsin for a prosecutor to have at his or her disposal two, three or even more statutes upon which to base a prosecution. Indeed, the legislature adds new criminal statutes each session, some of them designed to criminalize the specific conduct of a high-profile defendant whose conduct is already punishable under one or more existing criminal statutes. The resulting surfeit of overlapping

statutes complicates double jeopardy issues relating to multiple prosecutions. If a meaningful test under Wisconsin's double jeopardy clause is not formulated, the bar to successive prosecutions will be evaded simply because the legislature established numerous offenses, each with a slightly different set of legal elements.

As the people of this country and this state understand the double jeopardy clause, an individual cannot be prosecuted twice for essentially the same conduct. Witness the fact that many people found puzzling and even troubling that the police officers accused of beating Rodney King could be acquitted and then prosecuted a second time.

Adherence to the *Blockburger* test today invites the very abuses the double jeopardy clause was designed to protect against. As Justice Souter suggested in *Dixon,* "the government could . . . bring a person to trial again and again for that same conduct, violating the principle of finality, subjecting him repeatedly to all the burdens of trial, rehearsing its prosecutions, and increasing the risk of erroneous conviction, all in contravention of the principles behind the protection from successive prosecution. . . ."[3]

II.

The perils underlying a technical approach to comparison of offenses under *Blockburger,* and recognition that *Blockburger* does not sufficiently protect defendants from the burdens of mu[illegible]le trials, led the United States Supreme Court to t[illegible]ame conduct" test set forth in *Grady v. Corbin,* 495 U.S. 508, 520 (1990).[4] In

[3] *United States v. Dixon,* 61 LW 4835, 4855 (1993) (Souter, J. concurring and dissenting).

[4] The Court has distinguished between multiple punishments in one prosecution and multiple prosecutions. The

Grady the court added to the *Blockburger* test the requirement that a subsequent prosecution not require proof of conduct that constitutes an offense for which the defendant has already been prosecuted.

However, as the majority notes, *Grady* soon became the target of criticism. Among these criticisms is the valid concern that defendants could be convicted of a misdemeanor in one court, barring prosecution in another court for a felony arising out of the same conduct. Further, some critics contend that the difficulty of defining what constitutes the "same conduct" has rendered the *Grady* test unworkable.

III.

In light of the problems with *Blockburger* and the criticisms of *Grady*, a new approach to multiple prosecutions under the Wisconsin constitution should satisfy several important criteria. First, the test must remain true to the principles underlying the double jeopardy clause. It must protect the individual from the continuing anxiety, insecurity, and expense of repeated attempts by the state, with all its resources and power, to obtain a criminal conviction on the basis of the same "offense." Second, the test must produce results that

interests at stake in prohibiting multiple punishments and in avoiding successive prosecutions are different. *United States v. Dixon*, 61 LW 4835, 4851 (1993) (Souter, J. concurring and dissenting).

A prosecutor may bring one lawsuit charging the defendant under several or all of the statutes. On conviction, the defendant may be punished for violation of more than one statute if the legislature intended cumulative punishment. The legislature can impose severe and multiple punishments if it wishes because the legislature determines the penalty for a crime, within the limits of the Eighth Amendment.

carefully and fairly balance the individual's interest in protection from multiple trials and the public's interest in ascertaining guilt and punishing offenders. Requiring joinder of all charges and prohibiting all serial proceedings does not make sense under all circumstances. For example, under certain circumstances the prosecution should not have to forego more serious charges when less serious charges were initially prosecuted. Third, the test must be usable; prosecutors, defendants and the courts must be able to apply it with relative ease.

I recognize that we are unlikely to find a perfect test for multiple prosecutions under the double jeopardy clause that fits all cases. I also understand why counsel have not fully developed state constitutional arguments and new approaches to this problem. It is discouraging to expend the time and effort necessary to make state constitutional arguments when this court so often dismisses such claims out of hand. Although our court has in numerous instances recognized its authority to interpret Wisconsin's constitution, it has often adopted federal interpretations of provisions of the Wisconsin constitution without further analysis.

Double jeopardy jurisprudence is an important area of law where state courts have a special responsibility, especially in Wisconsin where the interpretations of the federal constitution do not seem to meet our needs. The application of the fresh thoughts and inspiration of counsel and the academic community to this challenge is welcome.

APPENDIX B

OFFICIAL WISCONSIN REPORTS

State v. Kurzawa, 173 Wis. 2d 769

STATE of Wisconsin, Plaintiff-Respondent,†

v.

Michael J. KURZAWA, Defendant-Appellant.

Court of Appeals

No. 92-0926-CR. Oral argument September 9, 1992.—Decided January 13, 1993.

(Also reported in — N.W.2d —.)

1. **Criminal Law and Procedure § 50*—double jeopardy clause—three protections.**

Double jeopardy clauses of both United States and Wisconsin Constitutions protect citizens against being put twice in jeopardy for same offense, and embody protection against second prosecution for same offense after acquittal, protection against second prosecution for same offense after conviction, and protection against multiple punishments for same offense.

2. **Criminal Law and Procedure § 50*—double jeopardy protection—second prosecution after acquittal—question of law—de novo review.**

In appeal from nonfinal order denying defendant's motion to dismiss criminal complaint charging him with 54 counts of uttering forged writings, issue of double jeopardy protection against second prosecution after acquittal for same offense presented question of law which court of appeals reviews de novo.

†Petition to review granted.

*See Callaghan's Wisconsin Digest, same topic and section number.

3. **Criminal Law and Procedure § 52*—double jeopardy—two-part test—theft by fraud—same core conduct.**

In appeal from nonfinal order denying defendant's motion to dismiss criminal complaint charging him with 54 counts of uttering forged writings in reliance on double jeopardy protections while state showed that each offense carried elements which required proof of facts other did not, state relied on same core conduct that constituted offense for which defendant had already been prosecuted, and so trial court's order was reversed.

NETTESHEIM, J., concurs.

APPEAL from an order of the circuit court for Walworth county: JAMES L. CARLSON, Judge. *Reversed and cause remanded with directions.*

On behalf of the defendant-appellant there were briefs by *Stephen M. Glynn* and *Robert R. Henak* of *Shellow, Shellow & Glynn, S.C.* of Milwaukee and oral argument by *Attorney Henak.*

On behalf of the plaintiff-respondent there was a brief by *James E. Doyle,* attorney general, and *Sharon Ruhly,* assistant attorney general, and oral argument by *Attorney Ruhly.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

NETTESHEIM, P.J. Michael J. Kurzawa appeals from a nonfinal order denying his motion to dismiss a criminal complaint charging him with fifty-four counts of uttering forged writings contrary to sec. 943.38(2), Stats. [1] The sole issue on appeal is whether the double jeopardy clause of the United States and Wisconsin Con-

[1] We granted Kurzawa's petition for leave to appeal by an order dated April 13, 1992.

*See Callaghan's Wisconsin Digest, same topic and section number.

stitutions bars this prosecution because Kurzawa was previously acquitted of theft by fraud charges based on the same core conduct as charged in this case. Pursuant to the United States Supreme Court decision of *Grady v. Corbin*, 495 U.S. 508 (1990), we conclude that the prosecution is barred on double jeopardy grounds. We reverse the trial court's order and remand with directions to dismiss the criminal complaint against Kurzawa.

For the purposes of Kurzawa's motion to dismiss in the trial court, the parties stipulated to the facts. Kurzawa served as an accountant and financial manager for the professional practices of Drs. Robert and Clarice Beckes. In this capacity, Kurzawa wrote numerous checks to himself on the Beckes' accounts and then cashed the checks. Based on this conduct, the state charged Kurzawa in Milwaukee county with two counts of felony theft by fraud, contrary to sec. 943.20(1)(d) and (3)(c), Stats. [2]

In the Milwaukee county theft by fraud proceeding a jury was impaneled and sworn. Therefore, jeopardy attached. Section 972.07(2), Stats. In that trial, the state sought to establish the element of "false representation" (*see* sec. 943.20(1)(d), Stats.) with evidence that Kurzawa had obtained money from the Beckes' accounts by forging the Beckes' names as the purported makers of the checks, by naming himself or his business as payee, and by then cashing the checks. The matter was never submitted to the jury, however, because the Milwaukee

[2] The first count related to the alleged theft from Dr. Robert Beckes' accounts; the second count related to the alleged theft from Dr. Clarice Beckes' accounts.

county circuit court granted Kurzawa's motion for a judgment of acquittal.[3]

Thereafter, the state initiated the Walworth county criminal proceeding which is the subject of this appeal. The criminal complaint in this action charges Kurzawa with fifty-four counts of uttering a forged writing contrary to sec. 943.38(2), Stats. Each count involves a check written by Kurzawa on the Beckes' accounts that was either cashed by him or deposited into one of his accounts at a Walworth county bank. The parties agree that the complaint in this case is based upon the same core conduct underpinning the Milwaukee county theft by fraud charges which were dismissed after jeopardy attached.

Kurzawa argued that this prosecution violated his constitutional protection against double jeopardy. The trial court disagreed, noting that the Milwaukee county charges and these charges did not possess an overlapping or concurrent necessary element between theft by fraud and uttering. Kurzawa appeals.

[1]

The double jeopardy clauses of both the United States and Wisconsin Constitutions protect a citizen against being put twice in jeopardy for the same

[3]Section 943.20(1)(d), Stats., the theft by fraud statute, requires that the false representation be made to either the owner of the property or the owner's agent. *See* Wis J I—Criminal 1453. In the Milwaukee county prosecution, the state attempted to prove that Kurzawa had made false representations to the Beckes' financial institution. However, the Milwaukee county circuit court reasoned that a Wisconsin financial institution's relationship to its depositor is one of creditor/debtor, not principal/agent. Therefore, the court determined that the state had failed to prove that Kurzawa's representations were made to the Beckes' agent.

offense.[4] Double jeopardy embodies three protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *Grady*, 495 U.S. at 516.

[2]

We are concerned in this case with the double jeopardy protection against a second prosecution after acquittal for the same offense. The issue presents a question of law which we review *de novo*. *State v. Poveda*, 166 Wis. 2d 19, 21, 479 N.W.2d 175, 176 (Ct. App. 1991); *State v. Harris*, 161 Wis. 2d 758, 760, 469 N.W.2d 207, 208 (Ct. App. 1991).

In *Grady*, the United States Supreme Court reviewed a double jeopardy claim made in the context of successive prosecutions for separate offenses which arose out of a single occurrence. There, the intoxicated defendant drove his vehicle over the center line and killed the driver of an oncoming car. Through an oversight in the local prosecutor's office, the defendant was only charged and convicted of driving while intoxicated and failing to keep to the right of the center line. The state later indicted the defendant for homicide and reckless assault in connection with the accident. The state confirmed that it would establish the defendant's guilt by proving his intoxication at the time of the accident, his failure to

[4] The Double Jeopardy Clause of the United States Constitution states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. It is enforceable against the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Article I, sec. 8 of the Wisconsin Constitution states: "[N]o person for the same offense may be put twice in jeopardy of punishment."

keep to the right of the median, and his driving too fast for conditions. *Grady*, 495 U.S. at 511-14.

The United States Supreme Court held that the successive prosecution was barred on double jeopardy grounds because the state sought to prove the "entirety of the conduct for which [the defendant previously] was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses." *Id.* at 523. The Court employed a two-step analysis. First, the Court applied the *Blockburger* [6] test which inquires whether the offense charged in the subsequent prosecution requires proof of a fact which the other offense does not. *Grady*, 495 U.S. at 515 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). If such an inquiry reveals that "the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred." *Id.*, at 516. As to this analysis, the *Grady* Court concluded that the offenses and attendant elements in the later prosecution were different from those in the prior prosecution. Thus, the state's multiple charging passed muster under the *Blockburger* test. *See Grady* at 515.

This did not conclude the Supreme Court's inquiry, however. The Court next turned to the second step of the analysis, examining whether "to establish an essential element of an offense charged in that prosecution, [the state] will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 521. The Court held that such was the case under the facts of *Grady*. *Id.* at 523. Therefore, the Court

[6] *Blockburger v. United States*, 284 U.S. 299 (1932).

concluded that the double jeopardy clause barred the subsequent prosecution.

We now turn to the application of *Grady* in this case. As to the first prong of the *Grady* analysis, both parties concede—and we agree—that the offenses at issue here survive the *Blockburger* test because they neither have identical statutory elements nor is one the lesser-included offense of the other. [6] *State v. Sauceda*, 168 Wis. 2d 486, 494-95, 485 N.W.2d 1, 4-5 (1992). Theft by fraud requires proof that the defendant obtained title to another's property by intentionally deceiving and defrauding the owner with a known false representation. *See* sec. 943.20(1)(d), Stats. In contrast, uttering a

[6] The statutory elements of theft by fraud under sec. 943.20 (1)(d), Stats., are:

> First, that the defendant made a false representation to (name owner of property.)
>
> Second, that the defendant knew that such representation was false.
>
> Third, that the defendant made such representation with intent to deceive and to defraud (name owner of property.)
>
> Fourth, that the defendant obtained title to the property of (name owner of property) by such false representation.
>
> Fifth, that (name owner of property) was deceived by such representation.
>
> Sixth, that (name owner of property) was defrauded by such representation.

Wis J I—Criminal 1453.

The statutory elements of uttering a forged writing under sec. 943.38(2), Stats., are:

> First, that the writing was one by which legal rights or obligations are created or transferred.
>
> Second, that the writing was falsely (made) (altered).
>
> Third, that the defendant uttered the writing as genuine.
>
> Fourth, that the defendant knew the writing was falsely (made) (altered).

Wis J I—Criminal 1492.

forged writing requires proof that the defendant presented or cashed as genuine a false or altered writing by which legal rights are created or transferred. *See* sec. 943.38(2), Stats. Thus, each offense carries elements which requires proof of facts which the other does not. Therefore, the state's successive charging of Kurzawa survives the *Blockburger* test.

We therefore move to the next level of inquiry under *Grady:* whether, to establish an essential element of an offense charged in that prosecution, the state will attempt to prove conduct that constitutes an offense for which the defendant has already been prosecuted. *Grady*, 495 U.S. at 521. As the *Grady* Court stated at another point, "if in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause would bar subsequent prosecution of the component offense." *Id.* at 521 n.11. The critical inquiry is what conduct the state will seek to prove, not the evidence the state will use in the attempt. *See id.* at 521.

As to the Milwaukee county theft by fraud charges, the parties stipulated that the state sought to establish the element of "false representation" by proving that Kurzawa had obtained money from the Beckes' accounts by forging the Beckes' names as the purported makers of the checks and naming himself or his business as payees. As to the Walworth county forgery charges, the parties have stipulated that the state intends to rely on the following conduct:

> [1.] Between a date prior to May, 1983 and the end of March, 1986, Mr. Kurzawa wrote a number of checks to himself or his business on the Beckeses'

[sic] business accounts, forging their names as the drawers of the checks. These checks included the checks which are set forth in Counts 1 through 54 of this information.

[2.] Mr. Kurzawa presented the checks set forth in Counts 1 through 54 of the information for cashing or deposit into accounts held in his name at the Walworth State Bank in Walworth County, Wisconsin.

[3.] Neither Dr. Robert Beckes nor Dr. Clarice Beckes gave the defendant permission to make the checks, to sign their names to the checks, or to present the checks for cashing anywhere.

[3]

Comparing Kurzawa's conduct in the Milwaukee county theft by fraud prosecution—particularly that concerning the element of false representation—with Kurzawa's conduct which the state alleges in this case, it is clear that the state relies on the same core conduct—Kurzawa's forging the Beckes' checks and naming himself or his business as payee. This is precisely what *Grady* forbids.

We reverse the trial court's order. We remand with directions to dismiss the criminal complaint.

By the Court.—Order reversed and cause remanded with directions.

NETTESHEIM, P.J. (*concurring*). Although I am the author of the majority opinion, I write separately to register some added observations about this case.

We correctly follow the United States Supreme Court's opinion in *Grady v. Corbin*, 495 U.S. 508 (1990), in this case. However, post-*Grady* decisions cast substantial doubt about the continuing vitality of *Grady*. Were it not for *Grady*, or if we had the authority to limit *Grady*, I suggest that a strong case could be made for

affirming the trial court's ruling that Kurzawa's double jeopardy rights are not violated by this successive prosecution.

The state argues that we should interpret *Grady* narrowly, limiting its application to those situations where jeopardy has attached to a clearly smaller offense before the greater offense is later charged. The state notes that the United States Supreme Court itself has noted problems with lower courts overreading *Grady*. In *United States v. Felix*, 112 S.Ct. 1377, *reh'g denied*, 113 S.Ct. 13 (1992), the Supreme Court acknowledged it would decline to read the language [of *Grady*] so expansively, because of the context in which *Grady* arose and because of difficulties which have already arisen in its interpretation. *Felix*, 112 S.Ct. at 1384. Instead, the Supreme Court in *Felix* harkened back to pre-*Grady* law to permit the successive prosecution. *Id.* at 1384-85.

Other jurisdictions have interpreted *Grady* in the narrow manner urged by the state or have otherwise embellished on the *Grady* analysis such that the clear thrust of *Grady* is avoided. *See, e.g., Ladner v. Smith*, 941 F.2d 356 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1665 (1992), and *Ex Parte Ramos*, 806 S.W.2d 845 (Tex. Crim. App. 1991) (en banc).

However, our principal function as an error-correcting court (*see Hillman v. Columbia County*, 164 Wis. 2d 376, 396, 474 N.W.2d 913, 920 (Ct. App. 1991)) does not permit us to so limit a decision of the United States Supreme Court on a point of federal constitutional law. Therefore, we previously certified this case to the Wisconsin Supreme Court asking that court to take up and clarify the effect, if any, of *Grady* and post-*Grady* decisions on Wisconsin double jeopardy law. However, the supreme court declined to take jurisdiction over this

appeal. We thus are left with *Grady* as the governing statement from the United States Supreme Court.

We also certified to the Wisconsin Supreme Court the question of the proper double jeopardy methodology in this successive prosecution case. In *State v. Sauceda*, 168 Wis. 2d 486, 485 N.W.2d 1 (1992), the supreme court clarified the methodology to be applied when multiple offenses are charged in a single prosecution. First, the multiple offenses are measured under the *Blockburger* [1] "elements only" test. This inquiry asks whether the elements of the multiple charges are the same. If so, double jeopardy exists and the subsequent prosecution is barred. *Sauceda*, 168 Wis. 2d at 493-95, 485 N.W.2d at 4-5.

If not, a presumption exists that the legislature intended to permit cumulative punishments for both offenses, *id.* at 495, 485 N.W.2d at 4, and the inquiry moves to a second level—whether this presumption is overcome by the demonstration of a contrary legislative intent. If so, the legislative intent—*not* double jeopardy principles—will preclude the subsequent prosecution. *See id. See also State v. Grayson*, 172 Wis. 2d 156, 159 & n.3, 493 N.W.2d 23, 25 (1992).

Grady, however, does not follow this second prong of the *Sauceda* methodology. Instead, *Grady* asks whether "[t]o establish an essential element of an offense charged . . . [the state] will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 495 U.S. at 521. In our certification, we asked the Wisconsin Supreme Court whether the *Sauceda* methodology or the *Grady* methodology applies in a successive prosecution case. We acknowledged that *Sauceda* concerned multiple charges in a single prosecution, whereas *Grady* was a successive

[1] *Blockburger v. United States*, 284 U.S. 299 (1932).

prosecution. We inquired whether such a distinction made any difference.

Again, with the supreme court having declined to take jurisdiction over this appeal, we do not see it as within our powers or function to say that the methodology set out by the United States Supreme Court in the successive prosecution setting of *Grady* does not also apply in this successive prosecution case. Therefore, we see ourselves obliged to follow *Grady*.

However, this leaves the law in a state which, in some cases, permits multiple charges in a single prosecution but forbids such charges in a successive prosecution. In fact, this may well be such a case. If the state had charged Kurzawa in a single prosecution with both forgery and theft by fraud, such would clearly survive the *Blockburger* double jeopardy prong of the test since the elements of the two offenses are different. And, I suggest that such multiple charging might also survive the legislative intent prong of the test under the approach taken by *Sauceda*.[2] Yet, under *Grady*, this prosecution is doomed.

[2] I say this because many of the reasons cited by the supreme court to justify the multiple charging in *State v. Sauceda*, 168 Wis. 2d 486, 497-501, 485 N.W.2d 1, 5-7 (1992), are also present in this case: a defendant should not be immunized from criminal responsibility simply because the conduct violates more than one criminal statute or subsection; the criminal offenses of forgery and theft by fraud have been recognized as separate and distinct for many years; and the penalties can be (and are as charged in this case) different.

In addition, unlike *Sauceda* where the elements of the multiple offenses were congruent except for the age of the minor and the state of unconsciousness, here the elements of the offenses have no such congruity. Looking at the forgery side of the coin, the common requirement in each element of forgery is a writing; theft

These possible disparate results make no sense to me. I appreciate the three areas of interest which double jeopardy protects. *See* majority opinion at 773. And I acknowledge that a defendant who is required to defend in a successive prosecution may well suffer a greater constitutional injury than one who is required to defend multiple charges in a single proceeding. [3] However, the difference is in the degree of the constitutional violation—not whether the violation exists in the first place. I question whether different methodologies, allowing for these disparate and illogical results, are required.

In *Sauceda*, the Wisconsin Supreme Court correctly acknowledged the confusion existing in some lower courts as to the applicable double jeopardy test. *Sauceda*, 168 Wis. 2d at 493, 485 N.W.2d at 4. Although *Sauceda* has both its fans and critics as to the merits, the decision is nonetheless helpful to the bench and bar because it resolves any conflict or confusion which may

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by fraud has no such requirement. Forgery requires that the writing create or transfer legal obligations or rights; theft by fraud does not. Forgery requires that the writing be uttered; theft by fraud does not. Forgery requires that the writing be falsely made or altered; theft by fraud does not. Forgery requires that the defendant know that the writing was falsely made or altered; theft by fraud does not. *See* Wis J I—Criminal 1453, 1492.

On the other side of the coin, theft by fraud requires, *inter alia*, a false representation to the owner or the owner's agent; forgery does not. Theft by fraud requires that the false representation be made with intent to defraud the owner or the owner's agent; forgery does not. Theft by fraud requires that the defendant obtain title to the property by virtue of the misrepresentation; forgery does not (the crime lies in the uttering of the writing, not in the obtaining of the property). And, finally, theft by fraud requires that the owner be defrauded; forgery does not. *Id.*

[3] *See Grady v. Corbin*, 495 U.S. 508, 518 (1990).

have existed under prior case law as to the proper double jeopardy methodology.

The question which remains unanswered is whether the *Sauceda* approach can and should also apply in a successive prosecution case. If so, the prospect of inconsistent results which *Sauceda* and *Grady* presently invite can be avoided. If not, then the bench and bar of this state will at least know that such inconsistency is constitutionally necessary.

In summary, we are obligated to follow the United States Supreme Court's opinion in *Grady*, even though it is an opinion of questionable and declining merit. If it were within the authority of this court, I would urge the application of *Sauceda*, a better reasoned opinion of the Wisconsin Supreme Court.

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

MICHAEL J. KURZAWA,

Defendant.

DECISION ON
MOTION TO DISMISS
DOUBLE JEOPARDY
Case No. 91-CR-378

The complaint and information in this case charge defendant with 54 counts of uttering forged checks. In the fall of 1990 an action for theft by fraud arising out of the same transaction was dismissed on motion for a directed verdict in Milwaukee County (see Ex. A, Stipulation of Facts). Pursuant to Wis. stats., sec. 971.31, defendant moves to dismiss this action on the ground it is barred as double jeopardy. Because I conclude the

action is not barred by the statute or caselaw defining double jeopardy, the motion is denied.

Defendant contends that because the State in this case must rely on the very same evidence it relied upon in the Milwaukee County action, for which he was acquitted, that this action constitutes double jeopardy as defined in Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L.Ed.2d 563 (1990). He concedes that the uttering charges are not the same or lesser included offenses of theft by fraud under the first phase of Corbin, the Blockburger[1] test (see also Wis. Stats., sec. 939.71).

He insists that it is under Phase II of Corbin that this action is barred,

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[1] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 2d 306 (1932)

since "it was necessary for all the ingredients of the underlying felony (uttering) to be proved" if the state was to win conviction in the first prosecution see Grady v. Corbin, 109 L. Ed. 564, n.11; see also Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977). In Harris a second prosecution for murder while committing a felony was barred because of a previous prosecution for the felony (a necessary element of the second prosecution). In Corbin the prosecution of DWI Causing Injury was barred by previous pleas to DWI and Operating Over Center Line--necessary elements of DWI Causing Injury).

Defendant in this case has set forth the necessary elements of theft by fraud and uttering. The elements of theft by fraud under Wis. Stats., sec. 943.20(1)(d) are:

> First, that the defendant made a false representation to (name owner of property).
>
> Second, that the defendant knew that such representation was false.
>
> Third, that the defendant made such representation with intent to deceive and to defraud (name owner of property).
>
> Fourth, that the defendant obtained title to the property of (name owner of property) by such false representation.
>
> Fifth, that (name owner of property) was deceived by such representation.
>
> Sixth, that (name owner of property) was defrauded by such representation.

Wis. J.I. -- Crim. 1453. The elements of uttering a forged writing under Wis.Stats., sec. 943.38(2) are:

> First, that the writing was one by which legal rights or obligations are created or transferred.
>
> Second, that the writing was falsely (made) (altered).
>
> Third, that the defendant

uttered the writing as genuine.

Fourth, that the defendant knew the writing was falsely (made) (altered).

Wis. J.I. -- Crim. 1492.

Defendant is not able to point to any element of theft by fraud that is necessary to the proof of uttering. In fact the only issue resolved in the first action was one of law. The Court ruled that taking the evidence (including that upon which the State now relies) most favorably to the State, it failed to establish defendant made a false representation to the owner's agent and that the money it gave to defendant in return for the forged checks was not the owner's (see Ex. "A" para. 5).

I believe defendant is incorrect when he asserts the State is barred by double jeopardy in this action because it relies on the very same evidence found inadequate

as stated above in the first action. In Harris v. Oklahoma, the felony murder charge was "a species of lesser-included offense" because he had already defended against the felony robbery charge, even though it was not technically a lesser included offense under that state's law. The majority opinion in Hellet v. State, 577 So.2d 915 (Ala. Crim. App. 1990) is not authority for defendant's contention as it decided a matter of evidentiary law. The concurring opinion relying on Ex Parte Oliver, 518 So.2d 705 (Ala. 1975) is not authority as it relies on Alabama statutory law defining lair included offenses which differs from Wisconsin law. Alabama law allows consideration of the peculiar facts of a given case in determining double jeopardy. Wisconsin law does not, see Randolph v. State, 83 Wis. 2d 630, 266 N.W.2d 334 (1977). In

the absence of a concurrent necessary element between theft by fraud and uttering, defendant's position is nothing more a "same transaction" argument expressly rejected in State v. Ramirez, 83 Wis. 2d 150, 265 N.W.2d 274 (197~) and again rejected post Corbin in State v. Harris, 161 Wis. 2d 758, 469 N.W.2d 207 (Ct. App. 1991). In Ramirez, the Court ruled that none of the elements of retail theft were necessary elements of Criminal Damage to Property or Resisting an Officer. In Harris, none of the necessary elements of Operating after Revocation were concurrent with Operating Automobile without Owner's Consent. In both cases, the charges stemmed from the same transaction. The same evidence could be used. But since a necessary element of the crimes did not overlap, the double jeopardy safeguard was not violated.

Since defendant has not been able to define a fact issue resolved in the first action and essential to the second action, the collateral estoppel doctrine also fails, cf., Grady v. Corbin, 109 L. Ed. 2d at 563, citing Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). As mentioned above, the only issue resolved in the first action was the insufficiency of the evidence to show defendant made a false representation to the owner of the money he obtained. As this element is not part of the uttering charge, it cannot serve as the basis for collateral estopped [sic], see State v. Elbaum, 54 Wis. 2d 213, 194 N.W.2d 660 (1972). Although the Supreme Court commended the practice of having the State try matters arising from the same transaction in one prosecution, it has stopped short of finding a double jeopardy

violation unless essential fact issues overlap.

Within ten days, plaintiffs' attorney shall submit an order consistent with this decision, with copy to defendants' attorney under the Court's five-day rule.

Dated: April 1, 1992

By the Court:

/s/

JAMES L. CARLSON

Circuit Judge

STATE OF WISCONSIN
CIRCUIT COURT WALWORTH COUNTY
BRANCH II

STATE OF WISCONSIN,

Plaintiff,

vs. ORDER

MICHAEL J. KURZAWA, Case No. 91-CR-378

Defendant.

The defendant, Michael J. Kurzawa's motion to dismiss this case on double jeopardy grounds has been considered by the court and the court having rendered it's written decision dated April 1, 1992, therefore,

IT IS HEREBY ORDERED, for the reason set forth in the court's decision dated April 1, 1992, the defendant's Motion to Dismiss on Double Jeopardy grounds is denied.

Dated at Elkhorn, Wisconsin, this 8th day of April, 1992.

By the Court:

/s/
Honorable James L. Carlson
Circuit Court Judge
Branch II

cc:Walworth Co. District Attorney's Office
Attorney Robert Henak

APPENDIX D

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 92-0926-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MICHAEL J. KURZAWA,

Defendant-Appellant.

February 22, 1994

Motion for reconsideration denied, without costs.

MARILYN L. GRAVES

CLERK OF SUPREME COURT